

FOURTH AMENDMENT PRINCIPLES AND SUPREME COURT PRACTICE

The freedom of the individual from official invasion of his privacy has long been held to be based upon the fourth amendment of the Constitution of the United States. Since the turn of the century there have been a plethora of cases dealing with the interpretation of the fourth amendment. Primary emphasis will here be given to these cases in an attempt accurately to portray the present overall interpretation of the amendment within the United States today. However, understanding the present necessitates a knowledge of the past. To that end a view of the historical setting of the amendment must precede a discussion of the present interpretation.

I. HISTORICAL DEVELOPMENT

The fourth amendment's affirmance of the right of the people to be free of unreasonable searches and seizures and its requirement of warrants issued upon probable cause came about as a result of the American colonists' bitter feeling against writs of assistance and general warrants. Writs of assistance, issued to customs officials to be used against smugglers, authorized blanket searches upon mere suspicion. General warrants were search warrants left blank as to persons and items to be searched for, which were filled in at the pleasure of the searching officials as they came upon seizable items. These odious practices were felt to be violative of the fundamental rights of Englishmen.

Writs of assistance had first been issued under statutes of Charles II,¹ and were generally in use in the Colonies from the time

¹ An act to prevent frauds and concealments of his Majesty's customs and subsidies (1660), 12 Car. 2, c. 19:

§ 1 [If uncustomed goods are] landed or conveyed away without due entry thereof first made, and the customer or collector or his deputy agreed with; then and in such case, upon oath thereof made before the Lord Treasurer or any of the Barons of the Exchequer, or chief magistrate of the port or place where the offense shall be committed, or the place next adjoining thereunto, it shall be lawful [to and for any of those officers] to issue out a warrant to any person or persons, thereby enabling him or them, with the assistance of a sheriff, justice of the peace or constable, to enter into any house in the day time, *where such goods are suspected to be concealed*, and in case of resistance to break open any such houses, and to seize and secure the same goods so concealed; and all officers and ministers of justice are hereby required to be aiding and assisting thereunto.

§ 2. Provided always, that no house shall be entered by virtue of this act,

of the French and Indian War. These writs were violently opposed by local merchants, although special writs for particular searches, based upon some proof, did not meet such fierce opposition.

In *Paxton's Case*,² James Otis argued that the writs of assistance, being against the fundamental principles of English law and against natural equity, were therefore void. It was Otis' contention that an officer of the Crown could enter the home of an accused only upon reliable information and with a special warrant secured by going before a magistrate.³ Otis lost the case against the writs, but it was with his eloquent plea that "the Child Independence was born."⁴ In 1765, the right of Englishmen, in England, to be free from the general warrants was affirmed in the cases of *Entick v. Carrington*⁵ and *Wilkes v. Wood*.⁶ In these two cases the general search warrant was condemned as violative of English liberty and "totally subversive of the liberty of the subject."⁷ Lord Camden in *Entick v. Carrington* stated:

By the laws of England, every invasion of private property is a trespass. No man can set his foot upon my ground without my license, but he be liable to an action though the damage be nothing. . . .

Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot by the laws

unless it be within the space of one month after the offense supposed to have been committed. . . .

§ 4. Provided also, that if the information whereupon any house shall come to be searched *shall prove to be false*, that then and in such case, the party injured shall recover his full damages and costs against the informer, by action of trespass to be therefore brought against such informer.

(Emphasis added.) The writs of assistance statute authorized searches upon mere suspicion rather than upon probable cause. Furthermore, it allowed a search to be legalized by what it turned up. These two concepts are both foreign to our constitutional system, and it was for these reasons, among others, that the fourth amendment was enacted.

² Quincy's Mass. Rep. 51 (1761).

³ Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle. . . . This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. . . . whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient.

Tudor, *Life of James Otis* 66-67 (1823), quoted in *Ker v. California*, 374 U.S. 23, 51-52 (1963) (dissenting opinion).

⁴ Bowen, *John Adams and the American Revolution* 217 (1950).

⁵ *Entick v. Carrington*, 19 How. St. Tr. 1030 (C.P. 1765).

⁶ *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1765).

⁷ *Id.* at 1167.

of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of a trespass, and demand more considerable damages in that respect.⁸

Another example of the disapprobation in which the general warrant was held in England at this time can be seen in the speech of Chatham:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his forces dare not cross the threshold of the ruined tenement.⁹

In 1776, the general warrant was declared illegal by Parliament.

The first American precedent¹⁰ for the fourth amendment was the Virginia Bill of Rights of 1776 which included a prohibition against general warrants.¹¹ Six other states adopted constitutional provisions prior to 1785 which served as precedents for the drawing of the fourth amendment.¹² The provision most closely approximating the fourth amendment was section ten of the Pennsylvania Declaration of Rights,¹³ later copied by Vermont.¹⁴ Section ten was not merely a condemnation of general warrants, as was the Virginia

⁸ 19 How. St. Tr. at 1066.

⁹ Quoted in Cooley, *Constitutional Limitations* 299 n. 4 (1868).

¹⁰ For the history leading up to the fourth amendment see Lasson, *Development of the Fourth Amendment to the United States Constitution* (1937); "The First Ten Amendments To The Constitution," in *Sources of Our Liberties* 418 (Perry ed. 1957).

¹¹ Adopted by the Williamsburg Convention, June 12, 1776, the Virginia Bill of Rights, art. X, provided:

That general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

See Lasson, *op cit. supra* note 10, at 79 nn. 1-3.

¹² Pennsylvania Declaration of Rights, § 10 (1776); Maryland Declaration of Rights, § 23 (1776); North Carolina Declaration of Rights, § 11 (1776); Vt. Const., § 11 (1777); Massachusetts Declaration of Rights art. 14 (1780); New Hampshire Bill of Rights, § 19 (1784). See Lasson, *op. cit. supra* note 10, at 79-82.

¹³ That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right and ought not to be granted. See "Constitution of Pennsylvania" in *Sources of Our Liberties*, *supra* note 10, at 330.

¹⁴ Vt. Const., § 11 (1777).

clause, but also sanctified the freedom from search and seizure, by requiring an oath or affirmation with a sufficient foundation as a prerequisite to the issuance of a warrant.¹⁵

The fourth amendment was not part of the original Constitution passed by Congress and ratified by the states.¹⁶ In response to the claim of several of the states that a Bill of Rights should exist, James Madison made nine proposals for a bill of rights to Congress in the summer of 1789.¹⁷ The fourth proposal contained the basis of the eventually adopted Bill of Rights. The search and seizure provision contained therein seemed directed solely against improper warrants.¹⁸ Interestingly, under the language of Madison's proposal, the right to be secure from unreasonable searches and seizures was not one presently created but one declared already in existence.¹⁹ Madison's proposals were referred to a Committee of Eleven, one member from each state, which reported its findings to the House. According to the available records, the House never agreed to the fourth amendment in its present form. The provision reported by the Committee of Eleven²⁰ contained the phrase "by warrants issuing"²¹ which Mr. Benson declared to be too narrow in scope, suggesting it be changed to "and no warrant shall issue."²² The former phrase seems to limit the protection given to no more than a right to be secure from unreasonable searches and seizures pursuant to improper warrants. Mr. Benson's phrase separates the

¹⁵ Pa. Declaration of Rights, *supra* note 13.

¹⁶ Lasson, *op. cit. supra* note 10, at 87-88.

¹⁷ Sources of Our Liberties, *supra* note 10, at 421.

¹⁸ The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

See Lasson, *op. cit. supra* note 10, at 100.

¹⁹ Lasson, *op. cit. supra* note 10, at 100.

²⁰ The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized. See Lasson, *op. cit. supra* note 10, at 101.

²¹ The reason for the seemingly limited scope of the proposed amendment by Madison and the draft of the Committee of Eleven can be traced to its early purpose—to combat such practices as the use of general warrants by British officials to enforce the acts of trade and to search for seditious publications. See Sources of Our Liberties, *supra* note 10; Lasson, *op. cit. supra* note 10, at 102-05.

²² Lasson, *op. cit. supra* note 10, at 101. There were additional changes in the proposed amendments due to: (1) mistake in phraseology, the word "secured" being changed to "secure," and (2) the absence of the phrase "unreasonable searches and seizures" which was in Madison's original draft.

"reasonableness clause" and the "warrants clause" suggesting that the two are independent and that the amendment protects both one's freedom from unreasonable searches, by whatever means, and one's freedom from the use of improper warrants. This suggestion was defeated by the House, but the Arrangement Committee (headed by Mr. Benson) included the changed phrase in the reported fourth amendment. All ten amendments were then accepted by the Senate and later formally enacted by Congress as a whole,²³ and ratified by the states.

The experiences of the colonists were undoubtedly "fresh in the memories of those who achieved our independence and established our form of government."²⁴ Their design in drafting the fourth amendment was to protect the citizen against intrusion into his private life in an unreasonable manner, and to allay the well-grounded fear of the people that the new government might be as oppressive as the old.²⁵ It is pointed out by Mr. Justice Frankfurter, dissenting in *Harris v. United States*,²⁶ that the original concept of an unreasonable search and seizure was one which was either warrantless or upon a general warrant, based upon mere suspicion, or without basis. In other words, the intent of the framers was to prohibit searches without warrants, searches upon general warrants,²⁷ and searches made without the proper degree of proof presented to the judicial officer who was to make the independent determination.²⁸

²³ *Lasson, op. cit. supra* note 10, at 103.

²⁴ *Boyd v. United States*, 116 U.S. 616, 625 (1886).

²⁵ The Declaration of Rights of Virginia (1796), provided for prohibition of the general warrant, and required warrants issued only upon probable cause, or evidence presented to a judicial officer, particularly describing the place of search and the thing to be searched for. See *Harris v. United States*, 331 U.S. 145, 159 (1947) (dissenting opinion). See also I Elliot's Debates (Virginia) 588 (1941 ed.), wherein it was said by Patrick Henry:

I feel myself distressed because the necessity of securing our personal rights seems not to have pervaded the minds of men; for many other valuable things are omitted: for instance, general warrants, by which an officer may search suspected places without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized and any property may be taken in the most arbitrary manner without evidence or reason. Everything the most sacred may be searched and ransacked by the strong hands of power.

²⁶ 331 U.S. 145, 161.

²⁷ See *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 336 (1841).

²⁸ *Frisbie v. Butler*, Kirby's Rep. 213 (Conn. 1785); *Grumon v. Raymond*, 1 Conn. 39 (1814). The Massachusetts Constitution of 1780, art. XIV, provides: Every subject has a right to be free from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of

Basic to the concept of government espoused by the framers of the Constitution was the belief that government should never be an instrument of arbitrary power and tyranny. Thus, the concept of checks and balances found within the fourth amendment is found as well within the original Constitution.

II. PRESENT SUPREME COURT INTERPRETATION OF THE AMENDMENT

The fourth amendment as adopted, lacking an extensive legislative history explaining its selection of words and phrases, has presented problems of interpretation which have harassed the courts in their decisions. By the first clause of the amendment all people seem to be protected from "unreasonable searches and seizures" of "their persons, papers, houses, and effects."²⁹ This clause has become known as the "reasonableness clause."³⁰ The amendment then declares that "no Warrants shall issue, but upon probable cause." The second clause is termed the "warrants clause"³¹ or the "probable cause clause."³² Finally the courts and commentators have identified both of these clauses with a principle—the right to privacy.³³ The relationship that these two clauses and this principle have to one another has never been fully developed by the Supreme Court. In looking at the present interpretation by the Court an attempt will be made to determine how the court is treating these various aspects. It may also be noted that the amendment sets out various formal requirements—that the probable cause be set forth by oath or affirmation, and that the warrant particularly describe the place to be searched or the thing or person to be seized. These requirements fall within the scope of the probable cause and reasonableness clauses respectively and will be treated in the general discussion of each.

The actual interpretation of the fourth amendment by the Supreme Court has had a relatively short history: the amendment lay substantially dormant during the first century following its

them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrants ought to be issued but in cases, and with the formalities prescribed by the laws.

²⁹ Notice the application of unreasonable searches and seizures to persons, papers, and effects, as well as to houses.

³⁰ *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950); *Trupiano v. United States*, 334 U.S. 699 (1948).

³¹ *Lopez v. United States*, 373 U.S. 427, 454 (1963).

³² *Draper v. United States*, 358 U.S. 307, 310 (1959).

³³ *Lopez v. United States*, *supra* note 31, at 455.

enactment.³⁴ Then, with increased federal participation in the regulation of interstate commerce and in the criminal process, the fourth amendment emerged as one of the most frequently invoked provisions of the Bill of Rights.³⁵

Out of the extensive litigation concerning the fourth amendment during the past seventy-five years there have developed five basic classes of case: (1) arrests with a warrant; (2) search with a warrant; (3) arrest without a warrant; (4) search without a warrant incident to an arrest with or without a warrant; and (5) search without a warrant not incident to an arrest. These areas will be treated separately to determine how the Supreme Court looks upon the aspects of reasonableness, probable cause, and the right to privacy with respect to each area.³⁶

Arrest Pursuant to a Warrant

The early common law of England seems to indicate that the arrest warrant was to be procured unless the delay would afford

³⁴ Lasson, *op. cit. supra* note 10, at 106.

³⁵ *Ibid.*

³⁶ Federal standards of reasonableness under the fourth amendment have been made applicable to the states through the due process clause of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). In a case in which the Supreme Court applies the constitutional standard as opposed to the federal supervisory standard, the action of the Court is as binding upon the state courts as it is upon the federal courts. *McNabb v. United States*, 318 U.S. 332 (1943). Although it had been recognized in *Wolf v. Colorado*, 338 U.S. 25 (1949), that matters essential to the right to privacy and implicit in the concept of ordered liberty could be enforced against the states, the court chose not to do so with respect to the federal exclusionary rule until 1961. It was not necessary to consider that standard binding upon states until that time. However, the Court said in *Mapp* that it would not apply federal standards of reasonableness to state court proceedings until the states had an opportunity to formulate their own standards. Thus, after *Mapp*, the states still had the right to determine the nature of a reasonable search as part of "the very essence of healthy federalism." *Mapp v. Ohio*, *supra* at 657. See also *Elkins v. United States*, 364 U.S. 206, 221 (1960).

In *Ker v. California*, 374 U.S. 23 (1963), however, the Court stated that it would apply federal standards of reasonableness to state proceedings.

This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. . . . Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. *Id.* at 33.

[This Court] will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—i.e., constitutional—criteria established by this Court have been respected. *Id.* at 34.

See also *Stoner v. California*, 376 U.S. 483 (1964).

opportunity for the suspected felon to escape.³⁷ However, the common law is somewhat unclear in this area, and the fourth amendment further confused the issue: it spoke of "search" and "seizure" and "warrant," without referring specifically to arrests. Apparently all of the cases involving arrest pursuant to a warrant that have reached the Supreme Court have dealt with the requirement of probable cause in the issuance of a warrant.³⁸ In the earliest case, *Ex parte Burford*, the Court held a warrant of commitment illegal where it failed to state some good cause and was not supported by oath, both required by the Court to substantiate probable cause.³⁹ In a recent leading case in this area, the defendant successfully attacked the issuance of a warrant for his arrest on the basis that the affidavit contained insufficient facts to constitute probable cause.⁴⁰ The affidavit contained no allegation that the affiant spoke with personal knowledge of the matters contained in the complaint nor did it indicate the sources of his belief. The Court, invalidating the arrest, claimed to reaffirm a similar ruling in another warrantless search case, *Johnson v. United States*,⁴¹ where the court stressed the requirement for a magistrate's independent judgment as to probable cause.⁴² It may be inferred from the Court's approach that it recognizes the principle of reasonableness operating with that of probable cause to require that an independent magistrate make the determination of probable cause whenever practical. A similar step in that direction has been made in a recent case where the Court stated:

These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an ar-

³⁷ Leagre, "The Fourth Amendment and the Law of Arrest," 54 J. Crim. L., C.&P.S. 393, 405 (1963). See *Leigh v. Webb*, 3 Esp. (Eng. N.P.) 166 (1800).

³⁸ *Giordenello v. United States*, 357 U.S. 480 (1958); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Albrecht v. United States*, 273 U.S. 1 (1927); *West v. Cabell*, 153 U.S. 78 (1894); *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806).

³⁹ *Ex parte Burford*, *supra* note 38.

⁴⁰ *Giordenello v. United States*, *supra* note 38; *United States v. Greenberg*, 320 F.2d 467, 470 (9th Cir. 1963); *Hollingsworth v. United States*, 321 F.2d 342, 348 (10th Cir. 1963). See Note, 27 Geo. Wash. L. Rev. 395 (1959), for the view that the decision was based entirely upon Rules 3 and 4 of the Federal Rules of Criminal Procedure and not upon the fourth amendment. Although this view was, and is, plausible, later developments show a majority of the Court entertained another view. *Aigular v. Texas*, 378 U.S. 108 (1964).

⁴¹ 333 U.S. 10 (1948).

⁴² *Id.* at 13-15.

rest warrant could not have been sought, is consistent with the Fourth Amendment.⁴³

Looking at the statements of the Court and the circumstances of these cases, there appears to be a strong undercurrent of judicial opinion that there is something more in the fourth amendment than the mere requirement of showing probable cause to make an arrest proper. This additional element may well be the inherent right to privacy which may not be invaded without a magistrate standing between the policeman and the individual, where the privacy of the home is to be invaded to make the arrest.

Search Pursuant to a Warrant

Where a search is to be conducted pursuant to a search warrant, the fourth amendment apparently authorizes a search of "persons, houses, papers, and effects" provided that the warrant is validly issued upon a showing of probable cause to a magistrate who makes an independent judgment. Actually, few cases contesting a search pursuant to a warrant have reached the Supreme Court. In *Jones v. United States*,⁴⁴ a search warrant was issued solely upon the basis of a police officer's hearsay affidavit reciting personal observations of the officer's informant. The court held that the warrant was issued on probable cause, but in so holding, the Court looked beyond the issuance of the search warrant to the officer's observations before the actual search, which corroborated the informant's story. The court by its opinion in the *Jones* case has diluted the probable cause element by stressing that "There is a large difference between the two things to be proved (guilt and probable cause) . . . and therefore a like difference in the *quanta* and modes of proof required to establish them."⁴⁵

Other cases—for example, *Marron v. United States*⁴⁶—dealing with search pursuant to a warrant have considered the requirement of particular description and declared that searches in excess of the scope of the warrant are unreasonable. The Court has stressed the requirement that warrants particularly describe the items to be seized as a protection against general searches. However, the Court

⁴³ *Jones v. United States*, 357 U.S. 493, 499-500 (1958).

⁴⁴ 362 U.S. 257 (1960). The Court stated that even as to the question of probable cause where no warrant exists, the officer may reasonably rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated.

⁴⁵ *Draper v. United States*, 358 U.S. 307, 311-12 (1959), quoted in *Jones v. United States*, *supra* note 44, at 270. See *Grau v. United States*, 287 U.S. 124, 128 (1932), rejected by *Draper*.

⁴⁶ *Marron v. United States*, 275 U.S. 192 (1927).

upheld the seizure in *Marron* on the ground that it was incident to a lawful arrest, even though the search warrant in that case failed to describe the items seized.⁴⁷ The Court thus arrived at the anomalous conclusion that, although the fourth amendment requires specificity of description as a protection against general searches, police in their discretion may make what are virtually general searches for evidence incident to an arrest. Clearly a search warrant which permits a general search is in violation of the reasonableness clause. *Marcus v. General Search Warrant*⁴⁸ stands for the proposition that searches conducted pursuant to a warrant which gives police unlimited discretion are unlawful. A third case, *Gouled v. United States*,⁴⁹ stresses that the use of search warrants is limited to those situations where the public or complainant has a primary right under law to the goods sought. No right exists to search and seize mere evidence either at common law or under the fourth amendment.⁵⁰

From all these cases, it appears that the Court does recognize the issuance of a search warrant as a protection of the right to privacy; that the general search pursuant to a search warrant violates this principle and is therefore unreasonable; and that there is a need for probable cause to procure a search warrant.

Arrests Without A Warrant

The four leading cases present a confusing picture of the present status of the law of warrantless arrests. While the first three cases thoroughly confuse the issue of probable cause, the last case tends to eliminate the principles of reasonableness and right to privacy.

In two cases the Court seems to take opposite positions on

⁴⁷ The Court asserted that under the fourth amendment prohibition of general searches, a search warrant describing intoxicating liquor and articles used for its manufacture does not authorize the seizure of a ledger and bills of account in a search of the premises pursuant to the warrant. A significant point here is the fact that the goods seized were a ledger showing large inventories of liquor, receipts and expenses, including gifts to police officers, and other things relating to the business, all located in a closet along with quantities of liquor. While the liquor in plain sight was seizable per se, the contents of the ledger could not be determined until the officers had looked through it to see if it had something to do with the crime. 275 U. S. 192 (1927) (dictum). See *Harris v. United States*, 331 U.S. 145 (1948), for the right of federal agents to seize contraband not even suspected to exist when the search was undertaken.

⁴⁸ 367 U.S. 717 (1961). The Court applied the fourth amendment through the fourteenth amendment and implied that the warrant was too general in its description of the items seized. *Id.* at 731-33.

⁴⁹ 225 U.S. 298 (1921). See *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958).

⁵⁰ *Gouled v. United States*, *supra* note 49, at 309; *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616 (1886).

similar sets of fact. In *Draper v. United States*,⁵¹ the Court held that probable cause existed to arrest and search the defendant, where federal narcotics officers relied solely upon the information of a paid informant who accurately described the appearance and itinerary of defendant and reported that he would have narcotics on his person. The officers had corroborated the defendant's reported appearance and location, but only corroborated the defendant's commission of crime after arresting and searching him. However, the same Court, in *Henry v. United States*,⁵² decided that federal agents lacked probable cause to stop and arrest the defendants where the agents had been told by the employer of one of the defendants that he was mixed up in interstate shipments, and the officers, who were investigating the theft of an interstate shipment of liquor, observed defendants twice loading cartons into a car from a house in a residential area. The Court failed to distinguish the two cases, merely reiterating the rule that a warrantless arrest for a felony can only be made where the offense is committed in the officer's presence, or he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony.

The third case, *Wong Sun v. United States*,⁵³ erodes further the *Draper* case. Here, the Court held that no probable cause existed for the arrest of defendant Toy who was arrested on the basis of the testimony of an informant that he had purchased an ounce of heroin the night before from one known to him only as "Blackie Toy," proprietor of a laundry somewhere on a named thirty-block street. The Court argued that probable cause must be measured according to the facts of the particular case and that

the . . . not infrequent abuse of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.'⁵⁴

In the fourth case, the confusion over the different aspects of arrest, search and seizure split the Court and resulted in a four-four stand-off affirming the arrest and search and seizure made in a California case.⁵⁵ There, on the day after a police officer's purchase of marijuana from a known peddler, other police officers

⁵¹ 358 U. S. 307 (1959).

⁵² 361 U.S. 99 (1959).

⁵³ 371 U.S. 471 (1963). See Broeder, "Wong Sun v. United States: A Study in Faith and Hope," 42 Neb. L.Rev. 483 (1963).

⁵⁴ *Wong Sun v. United States*, *supra* note 53, at 479; *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

⁵⁵ *Ker v. California*, *supra* note 36.

observed a meeting of the peddler and defendant husband under identical circumstances, except that the officers saw nothing pass between the two. Without securing a warrant, the officers, with hearsay information that defendant sold marijuana from his apartment, obtained a passkey from the building manager and entered defendant's apartment without warning, finding defendant husband seated in the living room and defendant wife in the kitchen. One of the officers identified himself, observed a package of marijuana on a scale in the kitchen, arrested the defendants, and searched the apartment. Four justices held that the search was validly made as incidental to a lawful arrest founded upon probable cause, and asserted that the officer's method of entry was not unreasonable.⁵⁶ Four other justices found the unannounced intrusion into the defendant's apartment in violation of the fourth amendment, relying upon the principles of reasonableness and right to privacy.

However, as to the warrant requirement, the court has specifically held that, absent an allegation and showing of a lack of probable cause, it makes no difference whether the officer made the arrest with or without a warrant.⁵⁷ This is to be compared with the indication of an opposite view by the Court in the *Jones* case, discussed earlier. Further, in *Trupiano v. United States*,⁵⁸ it is stated that the purpose of the arrest warrant is "to meet the dangers of unlimited and unreasonable arrests of persons not at the moment committing any crime."⁵⁹ There the Court held that the felony, operating an illegal still, was being committed plainly in the presence of the officers who were on the premises with the permission of the owner, and the dangers against which the arrest warrant protects were not present. While *Jones* and *Trupiano* appear to furnish valid distinctions in relation to the need of an arrest warrant, the cases previously discussed show that the Supreme Court has failed to operate consistently on the basis of this attitude. Cases like *Trupiano* and *Jones* illustrate the Court's recognition of a protection of the right to privacy in the arrest area, but other cases seem to overlook this in treating more obvious problems.

Searches Without a Warrant

The leading case in the area of warrantless searches, *Carroll v. United States*,⁶⁰ is also the leading case for the test of probable

⁵⁶ *Id.* at 46. For cases contra on the "authority and purpose" requirement before entering, see *Miller v. United States*, 357 U.S. 301 (1958); *Wong Sun v. United States*, *supra* note 53. See also *Broeder*, *supra* note 53, at 503-07.

⁵⁷ *Wilson v. Schnettler*, 365 U.S. 381 (1961).

⁵⁸ 334 U.S. 699 (1948).

⁵⁹ 334 U.S. 699, 705 (1948).

⁶⁰ 267 U.S. 132 (1925).

cause under the fourth amendment. The *Carroll* case states that probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.⁶¹ In *Carroll*, search without a warrant and subsequent seizure of liquor from an automobile was attacked as a violation of the fourth amendment. The seizure was upheld by application of the above test.

As to this element of probable cause in warrantless searches, the test for probable cause has recently been applied by the Supreme Court in *Chapman v. United States*,⁶² where the court, referring to *Johnson v. United States*,⁶³ held that where the search of a residence is involved a magistrate must stand between the officers and the search. The Court treated within the framework of probable cause a point more aptly placed under the principles of reasonableness and right to privacy.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case.⁶⁴

While the quotation and the two cases clearly show a recognition of principles of reasonableness and right to privacy in addi-

⁶¹ *Id.* at 162. See *Brinegar v. United States*, 338 U.S. 160, 175, (1949).

⁶² 365 U.S. 610 (1961).

⁶³ 333 U.S. 10 (1948).

⁶⁴ *Chapman v. United States*, *supra* note 62, at 614-15, quoting *Johnson v. United States*, *supra* note 41, at 13-15.

tion to the principle of probable cause, as declared in the *Carroll* case, it might be noticed that this language was applied to the search of residences. Therefore, while the search of the home is well protected from search without a warrant, there exist the questions whether the Supreme Court considered the right of privacy to reach beyond the home and whether the reasonableness of obtaining a search warrant reaches to areas and things outside the home as indicated by some cases in the past.⁶⁵

Search Incident to an Arrest

An exception to the requirement that a search warrant issue was formulated in *Weeks v. United States*.⁶⁶ The *Weeks* case involved a search incident to a valid arrest, which the Court declared was "always recognized under English and American law."⁶⁷ This exception was not mentioned in the fourth amendment, and the Court in *Weeks* cites very weak authority for the proposition.⁶⁸ The original purpose of the doctrine is sound in providing for a search of the arrestee and the area within his immediate control for weapons or means of escape which he might secrete either upon his person or close at hand for easy access if apprehended. The exception, having begun as a dictum in the *Weeks* case, gradually assumed more significance until, in *Marron v. United States*,⁶⁹ it became a specific holding, elevated to the role of constitutional doctrine.

⁶⁵ See *Gould v. United States*, *supra* note 49; *Amos v. United States*, 255 U.S. 313 (1921); *Boyd v. United States*, *supra* note 50; *Sirimarco v. United States*, 315 F.2d 699 (10th Cir. 1963), *cert. denied*, 374 U.S. 807 (1963); "Although not literally within the constitutional prohibition, we have long included in the notion that a search and seizure of one's person, house, papers and effects, without the authority of a search warrant, issued upon a showing of probable cause, was an unreasonable search. . . ." *Hart v. United States*, 162 F.2d 74, 75, (10th Cir. 1947). *But see* *Husty v. United States*, 282 U.S. 694 (1931).

⁶⁶ *Weeks v. United States*, *supra* note 50.

⁶⁷ *Id.* at 392.

⁶⁸ In 1 Bishop, *Criminal Procedure* §211, at 153 (1866), cited by the Court in *Weeks*, the author states the rule thusly:

[Then] if he finds on the prisoner's person, or otherwise in his possession, either goods or moneys which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, or supplying proofs relating to the transaction, he may take and hold them to be disposed of as the court directs.

Bishop cites no cases, but explains that the rule merely seems to flow from the reason of the things. Wharton, *Criminal Pleading and Practice* § 60 (8th Ed. 1880), also cited by the Court, limits the right to seize items from the person of the accused. See Wharton, *Criminal Pleading and Practice* § 97 (10th Ed. 1918).

⁶⁹ *Marron v. United States*, *supra* note 46.

For the doctrine to apply, the search must take place at the place of arrest and in close temporal proximity⁷⁰ and it will not apply where premises are searched out of the presence of the accused. There must be a valid arrest: the complaint upon which the arrest warrant is based must charge an offense, if there is an arrest warrant. However, it is not necessary in all cases to have an arrest warrant in order to validate the arrest.⁷¹ Practicability of obtaining a search warrant will not determine whether the search will be upheld, assuming a valid arrest and a specific object of search. The search need merely be reasonable.⁷² For the search to be reasonable, it must not extend beyond the ill-defined area which the Court finds in the particular case is within the control of the accused.⁷³

It seems that the exception has gone far beyond the original purpose of protecting the arresting officer or preventing concealment of means of escape, since searches need merely be "reasonable," and since the Court has made little effort to confine the doctrine except in cases of the most flagrant violation of the rights of persons accused of a crime. If the accused is arrested and is under the control of the officers, is there at that point any rational basis for allowing officers to search at their leisure without securing a warrant? It would appear that once the individual is in custody, the necessity for further search without a warrant would cease. If they have a basis for further search, they can easily secure a warrant. If they have no basis for a warrant, they have no right to search.⁷⁴

⁷⁰ *Weeks v. United States*, *supra* note 50; *Agnello v. United States*, 269 U.S. 20 (1925); *Chapman v. United States*, *supra* note 62.

⁷¹ *United States v. Lefkowitz*, 285 U.S. 452, 462 (1932).

⁷² *United States v. Rabinowitz*, 339 U.S. 56 (1950). "The relevant test is not whether it is reasonable to obtain a search warrant, but whether the search was reasonable." *Id.* at 66. In other words, if the arrest is valid and the search is confined to the area under the control of the accused and his person, the evidence so obtained will be admissible in a criminal prosecution. See *Draper v. United States*, 358 U.S. 307 (1959).

⁷³ The area of reasonableness has extended to an entire apartment in *Harris v. United States*, *supra* note 47, and in *Ker v. California*, *supra* note 36. The Court, however, refused to extend it to a cabin in *Kremen v. United States*, 353 U.S. 346 (1957). In *Harris* and *Ker*, however, the officers were looking for specific items; in *Kremen* they were merely looking. It extends to public and semi-public places. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Draper v. United States*, *supra* note 32. There are several factors at work to determine reasonableness, and each will be discussed separately in succeeding sections.

⁷⁴ In two recent cases, *Preston v. United States*, 376 U.S. 364 (1964), and *Stoner v. California*, *supra* note 36, the Supreme Court added further content to the doctrine of reasonable search incident to a valid arrest. In *Preston*, the Court indicated that its present tendency is toward limiting the doctrine, holding a search of defendant's automobile to be unreasonable where it took place after his arrest and incarceration. In *Stoner*, not remarkable on its facts, the Court held a search two days prior to arrest in another state unreasonable. See *Crawford v. Bannan*, 336 F.2d 505 (6th Cir. 1964).

The Court seems to have lost sight of the original purposes of the exception. In all but the most extreme circumstances, it indeed "makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the legality of an arrest."⁷⁵

The test of reasonableness allows something less than wholesale ransacking; something more than a search of the person of the accused and of his immediate surroundings. If from all the facts and circumstances it appears to the court to be reasonable, the search will be upheld. There are several interests at stake—the interest of the individual in preventing invasion of his privacy and the loss of liberty which he may suffer as a result of the unwarranted intrusion, the public interest in seeing that law enforcement is effective and in seeing that justice is done. These are all vital interests and the protection of each is well founded in history. In the last analysis, however, which interests are given maximum support will depend upon the value judgments of the Court. One question which might be asked at this point is: where is the greatest potential danger to our system of government?

III. REASONABLENESS: THE FEDERAL CONTENT

Standards of Reasonableness

The cases dealing with the reasonableness of a search incident to a valid arrest indicate several prevalent factors which, singly or in combination, may be determinative of the outcome. These factors include the scope of the search in area covered and in terms of the nature and number of items to be seized, the time when the search occurs, the place to be searched, whether the arrest is merely a pretext for search, immediate necessity to search, and consent of the accused.

As well as searches for evidence of crime, search by administrative officials, such as health inspectors, immigration authorities, and welfare agents has become prevalent. Serious questions are raised as to whether searches by these officers may be unreasonable, and if so, under what circumstances.

What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are reasonable searches and regrettably in our discipline we have no ready litmus paper test. The recurring questions of reasonableness of searches must find resolution in the facts and circumstances of each case.⁷⁶

⁷⁵ *United States v. Rabinowitz*, *supra* note 72, at 70 (dissenting opinion by Mr. Justice Frankfurter).

⁷⁶ *United States v. Rabinowitz*, *supra* note 72, at 63.

It is thus necessary to examine some of the facts and circumstances in which particular searches have been held reasonable or unreasonable. It is well settled that the officer may search the person of one who is arrested, or that part of the person which might reasonably be suspected of concealing weapons or fruits or instrumentalities of crime. Moreover, search is permissible within an area large enough to provide the officer with some measure of protection from concealed weapons and to guard against destruction or disposal of implements or fruits of crime or other contraband. The requirements as set up by the Supreme Court have been quite troublesome to the lower federal courts, particularly the requirement of immediate control over the premises. Searches held reasonable by lower federal courts range from a finding of a paper bag containing narcotics on a stand next to the defendant,⁷⁷ to a search of an entire restaurant and motel, including drawers and wastebaskets for items merely evidentiary in nature.⁷⁸ It is not suggested here—indeed it could not be—that all lower court decisions square with Supreme Court holdings. It seems clear, however, that the officers will not be limited to the one room in which the arrest takes place, so long as the search is reasonable in physical scope, nature and number of items taken, and is incident to the arrest.⁷⁹

Area

If an officer is lawfully upon the premises and unexpectedly finds an item, there would appear to be no bar to the use of that item in evidence against the defendant.⁸⁰ However, where the arrest is for car theft, and defendant is lawfully arrested at his home, the search of the house would be unreasonable, even though incident to a valid arrest, because it is not reasonable to expect to find a stolen automobile in a house. It would indicate that the officer was merely searching for something of possible value in a subsequent prosecution. This would be condemned as a general, exploratory search which is precisely what the fourth amendment intended to prohibit. Another illustration of unreasonableness could occur during

⁷⁷ *Carlo v. United States*, 286 F.2d 841 (2d Cir. 1961), *cert. denied*, 366 U.S. 944 (1961).

⁷⁸ *United States v. Boyette*, 299 F.2d 92 (4th Cir. 1962). Another example of the confusion is the contrast between *United States v. Papani*, 84 F.2d 160 (9th Cir. 1936), in which a search of a barn 100 feet from the place of arrest was held reasonable, and *Dulek v. United States*, 16 F.2d 275 (6th Cir. 1926), in which a search of a cabin 230 feet from the place of arrest was held unreasonable.

⁷⁹ *Ker v. California*, *supra* note 36; *Harris v. United States*, *supra* note 47. In *Villano v. United States*, 310 F.2d 680 (10th Cir. 1962), officers arrested defendant and took him to his office while they searched it. The court held that this was unreasonable as too far removed from the place of arrest.

⁸⁰ *Robinson v. United States*, 283 F.2d 508 (D.C. Cir. 1960).

the search of a home for bootlegging equipment. While officers may search closets or places where they might reasonably expect to find the equipment, searches of desk drawers, jewelry boxes or the like would not be permissible. It would be unreasonable to search these latter places for items such as boilers, mash vats, and copper coils. In the first illustration, the search of any part of the premises is unreasonable. In the second illustration, a search of a part of the premises would be reasonable, and a search of another part would be unreasonable.

The nebulousness of the concept of reasonableness or the scope of the search has not been conducive to the strict limitation of the right to search incident to a valid arrest, as has been noted by Mr. Justice Frankfurter.⁸¹ Mere reasonableness, without more, is not especially helpful to a court, in view of the broadening scope and the multitude of conflicting opinions on the content of reasonableness.

Nature and Number of Items Seized

Reasonable searches would seem to depend as much upon the nature and number of items seized as upon the permissible area which may be covered by the arresting officers. In most cases, the nature and number of items have a bearing upon whether the search is merely exploratory or whether the officers have a definite objective in mind. Thus in *Kremen v. United States*,⁸² the Supreme Court reversed a conviction based upon evidence gained in part by ransacking an entire cabin and seizing a great number of articles which were of little or no evidentiary value and did not come within the class of items which may be searched for and seized, *i.e.*, fruits of the crime, instrumentalities of the crime, contraband or weapons.

Only these latter four classes of items are properly seizable, even though other items may be found during the search.⁸³ Such items would include untaxed whiskey, counterfeit money, burglar tools, and things of like character. These items, if found during a reasonable search, may be used in a subsequent prosecution, notwithstanding that they are unrelated to the original purpose of the search.⁸⁴

⁸¹United States v. Rabinowitz, *supra* note 72, at 79: "If upon arrest you may search beyond the immediate person and the very restricted area that may fairly be part of the person, what rational line can be drawn short of searching as many rooms as arresting officers may deem appropriate."

⁸² 353 U.S. 346 (1957).

⁸³ Agnello v. United States, *supra* note 70.

⁸⁴ Harris v. United States, *supra* note 47. In United States v. Lefkowitz, 285 U.S. 452 (1934), it is said:

The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches

Congress, also, has recognized the basic distinction between items harmless in themselves (having merely evidentiary value) and those items directly connected with the commission of crime by delineating in the Federal Rules of Criminal Procedure the types of items for which search may properly be made pursuant to a warrant.⁸⁵ Under the Federal Rules, warrants may not issue for items of merely evidentiary value, and in light of the Supreme Court's decisions, this is a fourth amendment standard, and not merely a statutory requirement.⁸⁶ The purpose of the "mere evidence" rule is simply to restrict searches and to retain some semblance of privacy. It is not suggested, however, that the "mere evidence" rule is the sole solution to the problem of police control. Another solution might allow searches for mere evidence, but only upon warrant or upon independent probable cause. This, however, is not likely to be a solution which the courts or the police would advocate, since it involves more stringent requirements as to the time, place, manner of search and specific description while allowing the police a broader scope only as to the items for which search can be made.

Under the present status of the law, the courts have difficulty in determining what is merely evidentiary and what comes within the permissible area of search. An interesting contrast might be made in order to illustrate this uncertainty. In *Marron v. United States*⁸⁷ the Supreme Court held that a ledger and utility bills

such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Id.* at 465.

But see *Regina v. McKay*, 3 Cawf. & Dix, C.C. 205 (1844), an early Irish case which holds that if officers may seize anything at all, they may seize only items relative to the offense charged.

⁸⁵ Fed. R. Crim. P., Rule 41(b) provides:

A warrant may be issued under this rule to search for and seize any property:

- (1) Stolen or embezzled in violation of the laws of the United States; or
- (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
- (3) Possessed controlled or designed or intended for use or which is or has been used in violation of Title 18 U.S.C. Sec. 957." [Possession of property in and of a foreign government].

⁸⁶ *Gould v. United States*, *supra* note 49; *Go-Bart Co. v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, *supra* note 71; *Kremen v. United States*, *supra* note 73.

⁸⁷ *Supra* note 46. See also *United States v. Boyette*, *supra* note 78, which followed *Marron*.

found in a closet during a search for illicit liquor were instrumentalities of the crime of maintaining a nuisance. The items were innocent in themselves, and had the officers not leafed through them, they would not have known that the ledger and bills related to carrying on an illicit business. An approach more restrictive in terms of items to be searched for and seized appears in *United States v. Loft on Sixth Floor*.⁸⁸ In suppressing allegedly obscene materials, the court stated that the material "cannot be said to be the means or instrumentality of depositing itself for an interstate shipment with any carrier," distinguishing between items used as a means of committing a crime and items used merely to further the criminal purposes of the individuals actually engaged in committing crime. The court held that the latter were merely evidentiary.

The requirement that an item come within the prescribed classes in order to be subject to search and seizure is said to be an irrationality in the criminal law which has utility only in that it poses a restriction upon the power of officers to search and protects the individual's right to privacy.⁸⁹ However, it should be pointed out here that it poses no restriction upon the officers to search nor does it protect the privacy of the individual. It merely restricts a later use of the items in a criminal prosecution after the right to privacy has been invaded, and, as is pointed out by Kaplan,⁹⁰ privacy would be as well protected by restricting the search to particular days of the month. Indeed, this would have the added advantage of requiring no judicial interpretation!

Time of Search

The Federal Rules of Criminal Procedure, Rule 41(c), states in part:

The warrant shall direct that it be served in the day time, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time.

This statement is indicative of a policy on the part of Congress that searches conducted pursuant to warrants at night should require a greater standard of proof than searches conducted during the day time. Thus, if the affidavits do not contain either statements of personal knowledge of the affiant, or at the very least an extremely reliable hearsay declaration, a nighttime search is viola-

⁸⁸ 182 F. Supp. 322, 325 (S.D.N.Y. 1960).

⁸⁹ *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930).

⁹⁰ Kaplan, "Search and Seizure—A No Man's Land in the Criminal Law," 49 Calif. L. Rev. 474, 479 (1961).

tive of statute.⁹¹ The requirement of positive evidence to validate a nighttime search would not appear to be a fourth amendment standard insofar as it is based upon the warrants clause, because constitutionally only probable cause is required.⁹² However, in light of the more inconvenient nature of the nighttime search, and the experience of the framers of the Constitution, one might well be led to believe that there is a constitutional basis for the differentiation based upon the reasonableness of the search.

Arguably, it is unreasonable to conduct a search at night without having an extremely reliable basis for believing that the items for which search is to be made are upon the premises except in cases of absolute necessity; for example, a search for a bomb.⁹³ Indeed, there is a substantial basis for requiring a warrant to search at night, for until the warrant has been issued by a magistrate, no judicial barrier has been set up to protect individual liberties.⁹⁴ The control factor has been limitation of the search itself rather than the limitation of the right to search, that is, the courts have not discussed the requirement of independent probable cause or positive cause to search incident to an arrest at any time, assuming rather that probable cause is not required.⁹⁵

⁹¹ *United States v. Fitzmaurice*, 45 F.2d 133, 135 (2d Cir. 1930); *United States v. Kaplan*, 286 Fed. 963 (D. Ga. 1923). The court in *United States v. Tolomeo*, 52 F. Supp. 737, 738 (W.D. Pa. 1943), required as positive evidence only a statement that the items to be searched for are upon the premises, taking the view that something less than personal knowledge is required.

⁹² The fourth amendment provides in part: "and no warrants shall issue but upon probable cause . . .". This could be interpreted as including both nighttime and daytime searches. It would be extremely difficult to comprehend a concept of probable cause which gave the same words different meanings at different times, vague as the words are to begin with.

⁹³ *Brinegar v. United States*, *supra* note 54, at 180. See the dissenting opinion by Mr. Justice Jackson, advocating an exception to fourth amendment requirements on the basis of the social harm done, *e.g.*, enforcing the fourth amendment more strictly in favor of a bootlegger than in favor of a kidnapper.

⁹⁴ *Jones v. United States*, 357 U.S. 493 (1958); *Johnson v. United States*, 333 U.S. 10 (1948); *Distefano v. United States*, 58 F.2d 963 (5th Cir. 1932). *But see Ker v. California*, 374 U.S. 23 (1963), in which the officers had no warrant of any kind. The Court discussed only probable cause, and the facts of that case show no positive proof on the part of the officers that narcotics would be found. Indeed, at the time the officers broke into Ker's apartment, they had only suspicion.

⁹⁵ In *Ker v. California*, *supra* note 94, *Rabinowitz v. United States*, *supra* note 72, and *Harris v. United States*, 331 U.S. 145 (1948), the arresting officers would have been able to secure a warrant to search, for arguably there was independent probable cause to search. However, in none of these cases was the question discussed. In *Marron v. United States*, 275 U.S. 192 (1927), the Court again does not discuss the question of independent probable cause, but it does not seem that the officers would have been able to include the ledgers and bills in the search warrant since they were unknown at the time the warrant was secured. However, the Court there upheld the

Where the search is incident to a valid arrest, the time at which the search is made should not, in and of itself, be a limiting factor. The valid arrest underlies the search and validates it insofar as it is reasonable as to scope. Once the valid arrest has been made, the wheels of the criminal process are set in motion. The individual is lawfully in custody and the officers at that time have a right and a duty to search the person of the accused and the area within his immediate control, even though they do not have probable cause to believe that they will find any specific items. The stringent requirements of a nighttime search were formulated so that there could be no unwarranted invasion of individual privacy. If the rights of the individual have been respected to a degree consistent with the duties of the law enforcement officers, an otherwise reasonable search should be allowed, regardless of the time at which it takes place.⁹⁶

Place of Search

The fourth amendment affirms the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." This language might be interpreted strictly to mean that only persons and houses are entitled to be free of unreasonable searches for papers and effects. However, such an interpretation would not be consistent with the liberality with which such protective provisions should be construed and it has not been adopted.

An individual thus has a right to be free from unreasonable searches in his home or other living quarters,⁹⁷ his office⁹⁸ or other place of business,⁹⁹ his apartment or hotel room,¹⁰⁰ and all buildings within the curtilage.¹⁰¹ However, buildings outside the curtilage,¹⁰² or fields or grounds¹⁰³ have been held not to be within the constitutional protection. In any case, it would extend to the person, wherever he might be, and would extend to his papers and effects within the protected areas. The courts have placed more emphasis upon the "persons" and "houses" mentioned in the fourth amendment

search as incident to a valid arrest without discussing the requirement of independent probable cause.

⁹⁶ *Go-Bart Co. v. United States*, *supra* note 86.

⁹⁷ *Johnson v. United States*, 333 U.S. 10 (1948).

⁹⁸ *United States v. Rabinowitz*, *supra* note 72; *Go-Bart Co. v. United States*, *supra* note 86; *United States v. Lefkowitz*, 285 U.S. 452 (1932).

⁹⁹ *Warren v. Territory of Hawaii*, 119 F.2d 936 (9th Cir. 1941).

¹⁰⁰ *United States v. Jeffers*, 342 U.S. 48 (1951).

¹⁰¹ *Hester v. United States*, 265 U.S. 57 (1924); *Walker v. United States*, 225 F.2d 447 (5th Cir. 1955).

¹⁰² *Brock v. United States*, 256 F.2d 55 (5th Cir. 1958).

¹⁰³ *United States v. Sims*, 202 F. Supp. 65 (E.D. Tenn. 1962).

than they have placed upon the "papers and effects" of the individual in allowing unreasonable or trespassory searches in unprotected areas.¹⁰⁴ Therefore, whether a search is within or without the protected area may determine the use which may be made of the evidence, rather than the reasonableness of the search. In this sense, the place of search is crucial to a prosecution, but is not crucial in terms of the reasonableness requirement.¹⁰⁵ This would not appear to be consistent with recent cases of the Supreme Court which profess to do away with the outmoded concepts of property law as a basis for protection of constitutional rights.¹⁰⁶ If actual invasion of the constitutional rights of an individual may thus be permitted by such a restrictive interpretation, simply because a search occurs upon one part of an individual's property and not another, then the fourth amendment is merely partially protective of rights affirmed by that amendment. An impermissible, unreasonable search is unreasonable wherever it occurs, and the question whether an individual will be deprived of his liberty should not depend upon a fortuity.

Arrest As a Pretext for Search

A basic requirement of a reasonable search without warrant is an arrest to which the search is merely incident. If the arrest is a sham to cover up the real purpose of the officers, *i.e.*, making the search, the search will be unreasonable, even if the arrest be valid.¹⁰⁷ Thus an arrest for a minor traffic violation cannot be the basis of a search of the person for narcotics, if the primary purpose of the officers was to discover evidence of narcotics.¹⁰⁸ The intent of the officers is most important in this type of case. However, merely because items seized in a search incident to arrest are unrelated to the offense for which the individual was arrested it does not follow that the arrest was merely a pretext for search.¹⁰⁹ If the arrest is not a pretext and the individual is properly in custody the search is permissible regardless of purpose.¹¹⁰ *Charles v. United States*¹¹¹ is an interesting illustration of this point. There, local officers arrested

¹⁰⁴ *Hester v. United States*, *supra* note 101.

¹⁰⁵ *United States v. Young*, 322 F.2d 443 (4th Cir. 1963).

¹⁰⁶ *Jones v. United States*, 362 U.S. 257 (1960); See *Silverman v. United States*, 365 U.S. 505 (1961) (wiretap case), which was not based upon local rules of trespass, but upon "the reality of an actual intrusion into a constitutionally protected area." *Id.* at 512.

¹⁰⁷ *United States v. Lefkowitz*, 255 U.S. 452, 462 (1932); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961).

¹⁰⁸ *Taglavore v. United States*, *supra* note 107.

¹⁰⁹ *Collins v. United States*, 289 F.2d 129 (5th Cir. 1960).

¹¹⁰ *Abel v. United States*, 362 U.S. 217 (1960).

¹¹¹ 278 F.2d 386 (9th Cir. 1960), *cert. denied*, 364 U.S. 831 (1960).

defendant for assault and battery. After they had frisked him for weapons, they learned that he was a narcotics peddler. The officers then searched further, this time with the express purpose of finding narcotics, although he had not been arrested for this offense.¹¹² The court refused to look to the purpose of the second search, because the arrest had been made prior to the officers' knowledge of the narcotics, and was therefore not a pretext to search for it.

Once there has been a valid arrest for a proper purpose, the right to further privacy has been severely limited, but if the officers invaded the privacy of the individual unjustifiedly, a subsequent search cannot be justified.¹¹³ However, a thorough search for proper purposes ought not be unduly restricted where the individual is properly in custody.

In cases where the arrest is a pretext for the search for items unrelated to the offense giving rise to the arrest, the law enforcement officers are faced with a novel situation in which the arrest though valid and the search within reasonable bounds will still be held unreasonable because the arresting officers did not go to the premises in the proper, unknowing state of mind. It is in fact difficult in some cases to tell whether the officers went to arrest or to search. In most cases, they intend to do both. It is a fine line which the courts have drawn in assessing whether the arrest is a pretext for the search. The doctrine ought to be limited to clear cases in which the offense for which the individual is arrested is a minor one for which neither an arrest nor a search is usually made, and the items searched for are clearly unrelated to the offense upon which the arrest is based. It has not, however, been so limited. In *United States v. Harris*,¹¹⁴ the arrest was valid, the search was reasonable, and the items to be searched for related directly to the offense for which the arrest was made. The court held that the arrest was merely a pretext for the search, because the officers knew of the items previous to the arrest.

A problem closely related to the arrest as a pretext for search arises when officers contrive to arrest in a particular place where the officers strongly suspect that evidence may be found. Such tactics have been condemned and resulting searches held unreasonable, because, again, the search and not the arrest is uppermost in the minds of the arresting officers.¹¹⁵

¹¹² *Id.* at 388.

¹¹³ *Taglavore v. United States*, *supra* note 107, *Baskerville v. United States*, 227 F.2d 454 (10th Cir. 1955). And see *Abel v. United States*, *supra* note 110, as an example of the result reached where the protections of the fourth amendment are not extended by the courts.

¹¹⁴ 321 F.2d 739 (6th Cir. 1963).

¹¹⁵ *McKnight v. United States*, 183 F.2d 977 (D.C. Cir. 1950).

Consent

If an individual in fact consents to a search, or if he invites the search, it cannot be said to be an unreasonable imposition upon him. However, consent will not be implied, and all doubts will be resolved against the officer.¹¹⁶ Consent which is coerced is no consent, and an officer who demands or even one who asks admittance under color of his office cannot be said to have gained consent.¹¹⁷ Consent must be freely and intelligently given, and in view of the presumption against waiver of constitutional rights, there must be clear and positive proof of consent.¹¹⁸

The courts have thus adopted a very strict standard with respect to consent, and have excluded evidence where there is an unreasonable search and lack of consent to it. The basic question raised is what facts will establish consent or the lack of it. In all probability, consent given after arrest and incarceration will not be considered as having been given freely, regardless of the lack of external force and apparent lack of equivocation¹¹⁹ because of the show of force and the superior authority which the police are able to put forth.¹²⁰ Thus words such as, "You can go out and search the place; it's clean," said after questioning in jail have been held to be non-consensual.¹²¹ Courts are inclined to characterize such searches as mere submissions to authority. Evidence of such submission has been constructed from a mere showing of the police officer's badge,¹²² and it is of no consequence that the accused did not attempt to stop the search since such an attempt would undoubtedly have proved futile.¹²³ However, merely invoking authority which the officer does

¹¹⁶ *Judd v. United States*, 190 F.2d 649, 650 (D.C. Cir. 1951).

¹¹⁷ *Johnson v. United States*, 333 U.S. 10 (1947).

¹¹⁸ *Gatlin v. United States*, 326 F.2d 666 (D.C. Cir. 1963); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963); *United States v. Page*, 302 F.2d 81 (9th Cir. 1963); *Channel v. United States*, 285 F.2d 217 (9th Cir. 1960). *But see Robinson v. United States*, 325 F.2d 880 (5th Cir. 1964).

¹¹⁹ *Channel v. United States*, *supra* note 118.

¹²⁰ *Canida v. United States*, 250 F.2d 822 (5th Cir. 1958).

¹²¹ In *Judd v. United States*, *supra* note 116, at 651, the Court stated:

Conceivably, that is the calm statement of an innocent man; conceivably, again, it is but the false bravado of a small-time criminal. But, however it be characterized it hardly establishes willing agreement that the officers search the household without securing a warrant. Comparable statements have been held insufficient where the victim of the search was safely in his home.

¹²² *Johnson v. United States*, 333 U.S. 10 (1948); *Amos v. United States*, 255 U.S. 313 (1921).

¹²³ *United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951). In *Lerner*, the words used by officers were "you just sit quietly and you won't get hurt."

in fact possess will not invalidate the consent if it is freely given.¹²⁴

The case is not so clear, however, if the officer does not actually possess the authority, for example, if he could not get a warrant. In such a case there may be something analogous to a fraudulent inducement to consent, since the individual may well be motivated to consent by the apparent futility of refusing.

The "false bravado" test propounded by the court in *Judd v. United States*¹²⁵ indicates that coercion might be found in any case in which the individual had anything to hide, unless the consent to search amounts to a confession. However, if the accused confesses and leads the officers to the items for which the search would be made, there is no reason not to accept this as consent.¹²⁶

But if the courts were willing to require a full and fair disclosure by the officers to the individual as to the information which they possess, there would be no need to discuss the consent or lack thereof in terms of "false bravado." The individual would then be in possession of knowledge enabling him to consent or refuse consent on the basis of all the facts. If consent is given without full disclosure by the officers, then it should be clear that in legal contemplation, there has been no consent.

Consent may not be gained through a subterfuge. Thus, if the individual does not know that his visitors are police officers, or if they gain entrance through stealth, or as social or business callers, he cannot be held to have consented to a search by them.¹²⁷ If, however, knowing that they are police officers he invites them in, and while there, they observe contraband or other items which might properly be searched for, a conviction on the basis of evidence obtained at that time is proper.¹²⁸

Generally, consent to search may not be given by another, such as one's employer,¹²⁹ or his agent,¹³⁰ or the owner of the property which he rents.¹³¹ However, where two persons have equal rights to the use and occupancy of the premises, either may consent to a

¹²⁴ *Cofer v. United States*, 37 F.2d 677 (1930) (officer stated that he would return with a search warrant).

¹²⁵ 190 F.2d 649 (D.C. Cir. 1951).

¹²⁶ *United States v. Mitchell*, 322 U.S. 65 (1944); *Whitley v. United States*, 237 F.2d 787 (D.C. Cir. 1956); *Higgins v. United States*, 209 F.2d 819 (D.C. Cir. 1954); *Windsor v. United States*, 286 Fed. 51 (6th Cir. 1923); *McClintick v. United States*, 283 Fed. 781 (8th Cir. 1922).

¹²⁷ *Gatewood v. United States*, 209 F.2d 789 (D.C. Cir. 1953).

¹²⁸ *Reed v. Rhay*, 323 F.2d 498 (9th Cir. 1963).

¹²⁹ *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951).

¹³⁰ *Cofer v. United States*, *supra* note 124.

¹³¹ *Chapman v. United States*, 365 U.S. 610 (1961).

search over the other's objection.¹³² This would include partners,¹³³ husband and wife¹³⁴ or co-tenants.¹³⁵

Personal Observation by the Officer

A police officer should not be required to ignore evidence of crime which he can observe personally, because observation without more is not an unreasonable search.¹³⁶ What takes place in a case of personal observation by the officer is not in fact a search, with the poking and prying which that word connotes, but is something less than a search. For an item to be observable, it must be patently obvious or in plain sight.¹³⁷ In such a case, the officers ought not be required to close their eyes and walk away merely because they saw items for which they did not have a search warrant.

Courts have been critical of the officer who presses into a residence to search for unknown items, but where the items are of an incriminating nature, and are in plain sight of the officer,¹³⁸ it is permissible to say that there is no danger of a ransack search to find unknown items. Personal observation has built-in limitations which tend to keep it reasonable.

If there has been a considerable period of observation by police officers, as opposed to the situation involving mere chance observation, a warrant ought to be required because of the lack of immediate necessity.¹³⁹ If the officers are invited into the home, or go

¹³² *United States v. Goodman*, 190 F. Supp. 847 (N.D. Ill. 1961).

¹³³ *United States v. Sferas*, 210 F.2d 69 (1959), *cert. denied*, *Skally v. United States*, 347 U.S. 935 (1954).

¹³⁴ *Stein v. United States*, 166 F.2d 851 (9th Cir. 1948).

¹³⁵ *United States v. Goodman*, *supra* note 132.

¹³⁶ *Reed v. Rhay*, *supra* note 128; *Ellison v. United States*, 206 F.2d 476 (D.C. Cir. 1953).

¹³⁷ *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964).

¹³⁸ *Marron v. United States*, 275 U.S. 192 (1927); *United States v. Horton*, 328 F.2d 139 (3d Cir. 1964).

¹³⁹ *Jones v. United States*, 327 U.S. 493 (1958). It is somewhat questionable whether there need be immediate necessity to vindicate the officers' right to search on the basis of personal observation if the search is made incident to a valid arrest. In *United States v. Rabinowitz*, 339 U.S. 56 (1950), the Court held that it would look merely to the reasonableness of the search, specifically overruling *Trupiano v. United States*, 334 U.S. 699 (1948), on this particular point. However, in *Chapman v. United States*, 365 U.S. 610 (1961), the Court indicated that it would again require practicability, as pointed out by Mr. Justice Frankfurter's dissent. In *Ker v. California*, 374 U.S. 23 (1963), the Court mentioned the doctrine of immediate necessity to search which has special relevance in narcotics cases, and in cases involving search of vehicles, due to their mobility, but the Court has not indicated that it will require the immediate necessity or emergency situation to validate an otherwise reasonable search.

The doctrine of immediate necessity, if it is to be applied, would severely limit the search incident to arrest, for necessity exists only when the object to be searched for will shortly be removed or has unusual propensity for speedy destruction or dis-

there for purposes of official visitation, a mere observation and seizure of items will not be violative of an individual's right to privacy.¹⁴⁰ However, if the officers go merely as a pretext to observe, then the same result would follow as if there were an arrest as a pretext for search.¹⁴¹

An observation which involves a trespass upon defendant's property is not unreasonable merely upon that account. The officer must be illegally within the curtilage before the observation becomes unreasonable.¹⁴² Thus, if the curtilage is to be invaded for purposes of observation, it would be wise for the officers to obtain a warrant in advance of the invasion, so as to validate their entry upon the premises.¹⁴³ Especially in cases which involve prolonged periods of observation, this requirement for a warrant imposes only the slightest handicap upon the police.

Administrative Searches and the Need for Reasonableness

The basic difference between administrative searches and searches by police officers is that there are neither criminal process nor criminal sanctions directly connected with the administrative search.¹⁴⁴ The fourth amendment makes no distinction as to the type of search which it prohibits, other than the distinction predicated

posal, and where there is probable cause to search. Mere expediency is not enough if there is no danger of losing the items sought. See *McDonald v. United States*, 335 U.S. 451 (1948); *Johnson v. United States*, 333 U.S. 10 (1948).

¹⁴⁰ *Reed v. Rhay*, *supra* note 128; *Davis v. United States*, *supra* note 137; *United States v. Horton*, *supra* note 138.

¹⁴¹ *United States v. Evans*, 194 F. Supp. 90 (D.D.C. 1961).

¹⁴² *Hester v. United States*, *supra* note 101; *United States v. Benson*, 299 F.2d 45 (6th Cir. 1962).

¹⁴³ Evidence obtained by means of wiretap is a form of non-visual personal observation and is not within the scope of the instant discussion. Wiretap evidence is not unreasonable under fourth amendment standards. However, it is prohibited by 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958), and the Supreme Court has engrafted an exclusionary rule in the federal courts. In the future, however, this exclusionary rule, as in *Mapp*, may be applied to the states on the basis that the states, by allowing the use of illegally obtained evidence have violated defendant's right to privacy, and have affirmatively allowed police illegality. In other words, use of evidence gained in violation of a federal statute may be held to be unreasonable under a fourth amendment standard or a violation of due process of law under a fourteenth amendment standard.

Other methods of electronic eavesdropping are not prohibited and thus the courts must deal directly with the concept of reasonableness. The Supreme Court has recently held, in *Silverman v. United States*, *supra* note 106, that driving a spike microphone into a party wall is an "intrusion into a constitutionally protected area," and hence is not reasonable. This is an indication by the Court of a refusal to be swayed further by technical concepts of property law in assessing constitutional rights. Compare *Goldman v. United States*, 316 U.S. 129 (1942).

¹⁴⁴ *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960); *Abel v. United States*, *supra* note 110; *Frank v. Maryland*, 359 U.S. 360 (1959).

upon the reasonableness of the search. This would indicate that searches which are unreasonable, whether they are administrative or criminal, violate the fourth amendment. The Supreme Court, however, has made the distinction, and has excepted administrative searches from the requirements of the fourth amendment.

In *Frank v. Maryland*,¹⁴⁵ the Court said that one administrative search "touch[ed] at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion."¹⁴⁶ "Here was no midnight knock at the door, but an orderly visit in the middle of the afternoon with no suggestion that the hour was inconvenient."¹⁴⁷ The four dissenters in *Frank*, however, stated that no government official should be allowed to invade the home without having taken the proper procedural safeguards against infringement of individual liberty.¹⁴⁸

The *Frank* case goes even further than the cases which examine search incident to a valid arrest, for there was no arrest there. In administrative matters the need to search is not as pressing as it is in the average criminal case, since the matters in question—health problems, welfare checks—do not usually involve immediate danger to life and limb, or the possibility of destruction of evidence, the main bases for allowing search without warrant incident to a valid arrest.

*Abel v. United States*¹⁴⁹ involved an administrative arrest by the Immigration and Naturalization Service for purposes of deportation. Pursuant to an administrative arrest warrant, the Service arrested defendant and proceeded to make an extensive search of his belongings. The information was then turned over to the Federal Bureau of Investigation for purposes of criminal prosecution. There was evidence tending to show that the FBI had planned the entire operation and that FBI officers had been present during the administrative arrest and search, and that the whole operation had been planned so that the FBI could use the information gained

¹⁴⁵ 359 U.S. 360 (1959).

¹⁴⁶ *Frank v. Maryland*, *supra* at 367. *Frank* preceded *Mapp v. Ohio* in point of time. At the time of the decision in *Frank*, *Wolf v. Colorado* was still in effect. The writers have, however, no reason to believe that the result in *Frank* would be changed by the *Mapp* decision. In *Wolf*, the Court recognized as fundamental the right to be free from unreasonable searches and seizures, merely stating that the exclusionary rule was not a requirement of the fourth amendment. In *Frank*, the Court recognizes a different quality of right in relation to an administrative search than exists under either *Wolf* or *Mapp*.

¹⁴⁷ 359 U.S. at 366.

¹⁴⁸ 359 U.S. at 374. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), reaffirmed *Frank* without opinion.

¹⁴⁹ *Supra* note 110.

during the search. In other cases, the courts have held that such an operation is an arrest incident to the search, because of the primary purpose of the arrest.¹⁵⁰ The Supreme Court in *Abel*, however, refused to look beyond the reasonable scope of the search at the exact time of the arrest. A more reasonable approach would be to provide, in a subsequent criminal prosecution, some measure of protection by looking to the original search to see if it was reasonable and incident to proper formal proceedings entitling administrative officers to invade an individual's privacy, or look, hypothetically, to see if the evidence would have been properly procured had the police officers found it originally.

In a true administrative search, there is no intent to bring criminal proceedings against the individual. There is merely an intent to rectify a possible injury to the public health or some similar interest of the community. However, the possibility of finding evidence of an incriminating nature and therefore the possibility of a subsequent prosecution is still present. Furthermore, there is a basic inconsistency in allowing government in one of its aspects to search without formal proceedings and even without probable cause, as an incident to protection of health, welfare, and morals, and forbidding government in another form to search unless certain procedural safeguards are met. It is clear that the fourth amendment and the fourteenth amendment make no differentiation on the basis of the interests to be protected as the Supreme Court has done by declaring that certain types of searches need not be reasonable. The policies embodied in the fourth amendment have been determined, and in reason they apply with equal vigor to administrative searches.

Indeed, an administrative search, while it may not bring about a criminal prosecution, may give rise to civil sanctions, for example, fine, imprisonment for contempt, or deportation. In such cases the pressing need to prevent unreasonable invasions of privacy is quite clear. However, the rationale is ultimately predicated upon the possibility or severity of sanctions but upon the individual's right to be free from trespasses by the state.¹⁵¹ Judge Prettyman has stated the view succinctly:

The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. . . . It was not related to crime or to suspicion of crime. . . . To say that a man suspected of crime has a right to protection against search

¹⁵⁰ See notes 107 through 115, *supra*.

¹⁵¹ See *Entick v. Carrington*, 19 How. St. Tr. 1030 (C.P. 1765).

of his home . . . but that a man not suspected of crime has no such protection is a fantastic absurdity.¹⁵²

Thus, regardless of whether the search is to enforce the health laws, to search for evidence of crime, or to determine an applicant's eligibility for welfare, the invasion of privacy is the same, whether the loss be life, liberty, or property.¹⁵³

Certainly, we are involved in a balancing process where the right of the individual to privacy must be weighed against the need of society for efficient law enforcement. But the right of privacy should be maintained until a necessary exception is shown.¹⁵⁴ The determining factor in each case must be, as in the search of a moving vehicle or a search incident to an arrest, reasonable grounds that the accused will disappear or that evidence will be destroyed before a warrant can be procured and executed. In this manner the fourth amendment requirement of a warrant issued by an independent magistrate for a reasonable search or seizure is the rule, and the sole exceptions are those based upon necessity.

Standing to Object to Unreasonable Searches

Rule 41(e) of the Federal Rules of Criminal Procedure requires suppression of evidence obtained by unreasonable searches and seizures.¹⁵⁵ However, only a person aggrieved may object. Prior to the Supreme Court's decision in *Jones v. United States*¹⁵⁶ the concept of a person aggrieved was strictly limited by the ancient laws of property. It was required that the individual raising the question of unreasonable search and seizure claim ownership in the property seized or the premises searched. The problem which this presented was recognized by Judge Learned Hand in *Connolly v. Medalie*.¹⁵⁷

¹⁵² *District of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1950), *aff'd*, 339 U.S. 1 (1950).

¹⁵³ See *Boyd v. United States*, 116 U.S. 616 (1886). See also Reich, "Midnight Welfare Searches and the Social Security Act," 72 Yale L.J. 1347 (1963).

¹⁵⁴ See Justice Frankfurter's dissent in *United States v. Rabinowitz*, 339 U.S. 56, 68 (1950).

¹⁵⁵ Fed. R. Crim. P. 41(e) states:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant . . . The motion [to suppress evidence] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

¹⁵⁶ 362 U.S. 257 (1960).

¹⁵⁷ 58 F.2d 629 (2d Cir. 1932).

Individuals could come to court as victims of unreasonable searches or as non-owners of the property, but they could not adopt the two inconsistent positions. Thus, the individual was required to elect which horn of the dilemma would pinion him.¹⁵⁸

An individual now has standing to object to evidence obtained by an unreasonable search and seizure even though he claims that the property is not his and that it was not found upon premises owned by him where he is charged with possession.¹⁵⁹ The rationale behind such a holding is clear. If a defendant were required to claim that property belonged to him in order to secure the benefit of the exclusionary rule, it would be tantamount to a confession, in effect coerced, to a charged possession offense. Even if the search were ultimately found to be unreasonable, he might still be convicted upon the basis of the confession that he had contraband in his possession. If a defendant did not claim that the property was his, it could be used in evidence against him, over his objection.¹⁶⁰

At present, if the individual, even on the premises of another, is in such proximity to an article as to be able to exercise immediate control over it, even though he does not claim that the article is his, he has standing to object to its introduction into evidence.¹⁶¹ More than one person may have standing to object to the use of a single item or the search of a single premises, for example, an owner and a lessee,¹⁶² joint owners or joint tenants, or a bailor and bailee,¹⁶³ or even a licensee or invitee on the premises.¹⁶⁴ An author of a letter and the recipient may both have standing to object to the use of the letter in evidence, even though under traditional property concepts, the author would have no more interest in it.¹⁶⁵ Similarly, a husband and wife may both object to the use of money taken from the wife's purse, if the husband can prove that he gave it to her.¹⁶⁶ It is still the rule, however, that the individual must show some

¹⁵⁸ *Id.* at 630.

¹⁵⁹ *Jones v. United States*, *supra* note 156.

¹⁶⁰ *Baskerville v. United States*, *supra* note 113; *United States v. Blok*, *supra* note 129; *Grainger v. United States*, 158 F.2d 236 (4th Cir. 1947). One court even went so far as to hold that a lessee could not object to evidence where he did not claim to occupy the premises. *Curry v. United States*, 192 F.2d 571 (5th Cir. 1952).

¹⁶¹ *Carlo v. United States*, 286 F.2d 841 (2d Cir. 1961), *cert. denied*, 366 U.S. 744 (1961).

¹⁶² *United States v. Elliot Hall Farm*, 42 F. Supp. 235 (D.N.J. 1941).

¹⁶³ *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962).

¹⁶⁴ *United States v. Blitz*, 199 F. Supp. 326 (E.D.N.Y. 1961).

¹⁶⁵ *Harlow v. United States*, 301 F.2d 361 (5th Cir. 1962), *cert. denied*, 371 U.S. 814 (1963).

¹⁶⁶ See *Ramirez v. United States*, 294 F.2d 277 (9th Cir. 1961).

invasion of his privacy, even though he has no ownership interest in the property.¹⁶⁷ Thus, an individual has no standing to object to evidence used against another,¹⁶⁸ nor may he object to the use of evidence against him even though it was illegally obtained from another.¹⁶⁹

Property which has been abandoned can no longer be considered to belong to the accused and will be admitted over his objection. However, for purposes of standing, it is difficult to abandon an item. The standard appears to require a complete loss of possession and control. Thus even throwing an item into the trash is not considered abandonment for purposes of standing to object to that item.¹⁷⁰

One problem which does not seem to have arisen as yet is the "cross use" of evidence obtained through unreasonable search and seizure. In such a case, officers could search unreasonably the premises of two or more individuals who are partners in crime or members of a conspiracy. The prosecution under the present status of the law could be permitted to use the evidence so obtained in each search against members of the conspiracy whose privacy was not invaded by that particular search, even if another unreasonable search had been made of that person's premises. The net result would be several illegal searches and seizures, and as many successful prosecutions. This would be true simply because of each person's lack of standing to challenge the particular evidence used against him. It is hoped that the courts would realize that this too makes a mockery of the fourth amendment, and that they would apply a "totality concept"; in other words, view the transaction as a whole. In light of the Supreme Court's rejection of artificial property distinctions in *Jones v. United States*,¹⁷¹ which held that a defendant has standing to object to evidence if he is charged with possessing it, the way is clear for such a holding in a proper case.¹⁷² The reason

¹⁶⁷ *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961).

¹⁶⁸ *Gibson v. United States*, 149 F.2d 381 (D.C. Cir. 1945), *cert. denied*, *O'Kelly v. United States*, 326 U.S. 724 (1945).

¹⁶⁹ *Lagow v. United States*, 159 F.2d 245 (2d Cir. 1947), *cert. denied*, 331 U.S. 858 (1947). See *Henzel v. United States*, 296 F.2d 650 (5th Cir. 1961).

¹⁷⁰ *Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957). However, the result would be different if the trash were subsequently collected. See *United States v. Minker*, 312 F.2d 632 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963).

¹⁷¹ *Jones v. United States*, *supra* note 156.

¹⁷² California, since adopting the exclusionary rule, has so held in *People v. Martin*, 45 Cal. 2d 755, 759, 290 P.2d 855, 857 (1955), on the basis that the evidence itself is tainted because illegally obtained and is inadmissible because it is a violation of the defendant's constitutional rights to use it, not because it was obtained in viola-

that courts have emphasized standing in the past is that the fundamental concern has been with the right to privacy. However, if the purpose of the exclusionary rule is to balance the equities and return matters to the status quo prior to the illegal police action, then standing should not be a problem in any case in which illegally obtained evidence it attempted to be used against a defendant.

Reasonableness: A Summary

The concept of reasonableness is a construct which the Supreme Court uses in determining whether or not evidence gained by a search will be admitted into evidence in a criminal prosecution. The question is one of characterization of the content of reasonableness to see what might be considered reasonable in a particular case. The interpretation which has been put upon the fourth amendment's reasonableness clause is that searches may be reasonable without a search warrant if made incident to a valid arrest. A search made incident to an arrest is not entirely protected by the fourth amendment's prohibition of unreasonable searches. If a search actually is incident to an arrest, it is *prima facie* reasonable, and will be declared unreasonable only if it is found that it exceeds the bounds previously outlined.¹⁷³

The incident-to-a-valid-arrest test does not seem to be the soundest criterion of reasonableness, in order to legalize a search, because there may be no rational connection between the arrest and the search. If the individual is arrested a block from his home, no search could be made of the home merely because he was arrested. The fact that he is in his home at the time of the arrest is merely fortuitous, and should not give the officers license to roam at will. Under the incident-to-a-valid-arrest test, the defendant's papers and house are more protected by the Constitution while he is away than while he is there, an anomalous situation of small comfort to an accused.¹⁷⁴

In certain emergency cases, it is undesirable to obtain a war-

tion of defendant's constitutional rights. Previous emphasis has been upon an individual's right to privacy, but the purpose of the exclusionary rule is not merely to protect the right to privacy. Its purpose is to prevent benefit from illegal police practices altogether.

¹⁷³ *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950). Mr. Justice Frankfurter, dissenting, states that the historical context of the fourth amendment shows that searches without warrants and searches with warrants unrestricted in scope were deemed unreasonable, barring only exceptions justified by "absolute necessity." Under the historical theory, a warrant would be required to make the search reasonable in all but a very few cases.

¹⁷⁴ See *United States v. Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926).

rant, either to arrest or to search, for example, where a felony is committed in the presence of the officer or where the officer has probable cause to believe that a felony has just been committed and that the accused committed it. A search of the person in either of the above examples would certainly come within the original purpose of the doctrine of search incident to arrest. Indeed, an officer might well be considered lax in his duties if he failed to search the person suspected. In all other situations, reasonableness should be based not upon the tenuous doctrine of search incident to arrest, but upon whether there is cause to invade the privacy of the individual at this particular time.¹⁷⁵ By requiring only a reasonable search, regardless of need, to invade the privacy, the warrants clause of the fourth amendment is seriously weakened, and greater impetus is given to law enforcement officials to disregard the inconvenient and limiting procedure of securing a warrant. In one respect, it might well be to the advantage of the officers to secure a warrant however. While under a search warrant, officers are limited to a search for specific items, they may use a valid arrest to validate a finding of articles which might not have been specified in a search warrant. Under a search incident to a valid arrest, the officers will usually be more strictly limited in the area which they can cover. Under a search warrant, as long as they are looking for the specified items, and have not merely started rummaging, they may cover a much broader area. Indeed, under a warrant, officers may search the entire premises. If they should unexpectedly come upon an item which is incriminating and is of such a nature that it would properly have been the subject of a search, it may be justified as incident to the arrest.

It is apparent that a balance must be maintained between conflicting interests of society that would promote security within one's home and at the same time maximize the freedom of law enforcement officers to protect the peace and order of the community. Criminal searches do invade privacy and often involve substantial

¹⁷⁵ See *Trupiano v. United States*, 334 U.S. 699 (1948). This case was subsequently overruled by *United States v. Rabinowitz*, 337 U.S. 56 (1950), on this particular point. The Court does not appear disposed to reconsider the problem, for in *Ker v. California*, 374 U.S. 23 (1963), the Court upheld a nighttime arrest and search of an apartment and an automobile as incident to a valid arrest, even though on the facts there appears to have been ample time to secure a search warrant, and it is very probable that the officers could have described particularly the items to be searched for. Rather, the Court appears to be extending the doctrine of search incident to arrest by allowing a nighttime arrest upon probable cause to validate a night-time search going beyond even present limits, extending not only to an apartment but to an automobile parked some distance from the apartment.

damage to reputation. Thus the fourth amendment imposes upon law enforcement officers the standard of probable cause.¹⁷⁶ It is the strict enforcement of this standard that balances these conflicting interests of society and prevent police intrusions such as found in *Entick v. Carrington*.¹⁷⁷

In the United States, civilized standards of search and seizure are the rule rather than the exception. In *Rochin v. California*¹⁷⁸ police officers transgressed the bounds of decent law enforcement, violating defendant's person in a shocking manner. The needs of society are not well served by the use of brutal methods. The same principle, while not so strikingly brought to one's attention, is involved in all search and seizure cases. In fact, where shocking methods are absent, the harm done to one's privacy may be just as great.

An arrest at the minimum requires probable cause, with or without a warrant, whereas a search at the minimum need only be reasonable under the circumstances.¹⁷⁹ The standard for arrests with warrants and without warrants is not the same. Otherwise the officers would have no incentive to procure arrest warrants.¹⁸⁰ Thus, the Court has made a distinction between arrests and searches. This is unwarranted under the fourth amendment, which makes no distinction between the two.

Any impediments to law enforcement brought about by the enforcement of constitutional rights is a small price to pay for the safeguarding of liberty. The framers of the Constitution made the policy decision as to which interest deserved the greater protection long ago: "To break and enter . . . to destroy all the rights to privacy in an effort to uproot crime may suit the purposes of despotic power, but those methods cannot abide the pure atmosphere of a free society."¹⁸¹ This, then, is the primary reason for requiring warrants in all but the most pressing circumstances, and why the search without warrant incident to arrest should be limited to its original purposes, which were born of necessity rather than convenience. The present law of search and seizure purports to be a rule

¹⁷⁶ See Comment, "Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment," 28 U. Chi. L. Rev. 664 (1961).

¹⁷⁷ *Entick v. Carrington*, 19 How. St. Tr. 1030 (C.P. 1765).

¹⁷⁸ 342 U.S. 165 (1952).

¹⁷⁹ *Wong Sun v. United States*, 371 U.S. 471 (1963).

¹⁸⁰ *Ibid.* See also Barrett, "Police Practice and the Law—From Arrest to Release or Charge," 50 Calif. L. Rev. 11, 20 (1962); Note, "Philadelphia Police Practices and the Law of Arrest," 100 U. Pa. L. Rev. 1182 (1952).

¹⁸¹ *Harris v. United States*, 331 U.S. 145, 192 (1948) (dissenting opinion of Justice Murphy).

of necessity, but as can be seen from a reading of the cases, necessity is not actually a requisite to the validation of a search incident to an arrest. The fourth amendment imposes substantive standards for searches and seizures. It also establishes a procedure for effectuating the rights of individuals—the deliberation of a dispassionate magistrate. The Court in undercutting the warrants clause of the fourth amendment has caused the decline in importance of the magistrate, and has made the initial arbiters of reasonableness the very people who are most interested, the officers themselves. This could cause substantial deprivation of liberty, since a convict may be required to wait forever for Supreme Court review of his case, which is currently the only effective control upon improper police practices.

IV CONCLUSION

Both the requirements of probable cause and reasonableness find their basis in the long established principle of the right of privacy, a concept whose roots reach deep in the private law of property.¹⁸²

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.¹⁸³

In view of such a statement and the wording of the fourth amendment that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," it logically seems that the right of privacy extends to such persons, houses, papers, and effects. However, due to the right of privacy being tied historically to property law and the idea that "a man's home is his castle,"¹⁸⁴ the majority of Supreme Court cases stressing this right have dealt only with the search of a person's residence without a search warrant.¹⁸⁵ To

¹⁸² See "Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment," *supra* note 176, at 667-78; Lasson, *Development of the Fourth Amendment to the United States Constitution* (1937).

¹⁸³ *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). See *Johnson v. United States*, 333 U.S. 10 (1948).

¹⁸⁴ Quoted in Lasson, *op. cit. supra* note 182 at 50. See *Entick v. Carrington*, *supra* note 177.

¹⁸⁵ *Jones v. United States*, 357 U.S. 493, 498 (1958); *McDonald v. United States*, *supra* note 139, at 453; *Johnson v. United States*, *supra* note 183. Cf. *Giordenello v. United States*, 357 U.S. 480 (1958), which was cited in *Jones v. United States*, *supra*, for the proposition of the right to privacy. *Giordenello* is a case of an arrest without probable cause for the warrant issued.

this extent at least the right has been interpreted to require a magistrate to make an objective, independent decision as to probable cause before a warrant may issue, with permission to invade privacy therefore being the controlled exception rather than the general rule.¹⁸⁶

On the other hand, two cases recently decided by the Court, tend to assert the view that the right of privacy and the requirement for a search warrant is limited to invasions pursuant to criminal proceedings, and that an administrative search without a warrant is not in violation of the fourth amendment.¹⁸⁷ A third case permitted an extensive search pursuant to an administrative arrest upon a warrant, which had been issued by an officer of the arresting agency and not an independent magistrate.¹⁸⁸

Nevertheless, since the famous Warren-Brandeis treatise some seventy-five years ago,¹⁸⁹ the right of privacy of the individual has taken on an increasingly more important appearance in the United States.¹⁹⁰ Of the four torts evolving from this recognized right of privacy only the first—"[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs"¹⁹¹ is of primary importance in the area of search and seizure. In reality, is the invasion of the person any less an invasion of his privacy under the fourth amendment than the invasion of his home? The exposure of the individual to an arrest or search incident thereto without an independent magistrate's decision seems as unreasonable as a search of one's residence without a warrant, from the point of view of invasion of privacy. In *Jones* the Court suggested that the right of privacy applied equally to the arrest in *Giordenello*¹⁹² where there was no invasion of the home but merely an invasion of the person and his effects.

Further, the intertwining of the fourth and fifth amendments by the Court has been explained on the basis that:

¹⁸⁶ *McDonald v. United States*, *supra* note 139; *Johnson v. United States*, *supra* note 183.

¹⁸⁷ *Ohio ex rel. Eaton v. Price*, *supra* note 144; *Frank v. Maryland*, *supra* note 144. See "Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment," *supra* note 176, at 666-78; Comment, 44 Minn. L. Rev. 513 (1960).

¹⁸⁸ *Abel v. United States*, 362 U.S. 217 (1960).

¹⁸⁹ Warren & Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890).

¹⁹⁰ See Ezer, "Intrusion on Solitude: Herein of Civil Rights and Civil Wrongs," 21 Law in Transition 63 (1961); Prosser, "Privacy," 48 Calif. L. Rev. 383 (1960).

¹⁹¹ The other three torts are: (2) Public disclosure of embarrassing private facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; and (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. Prosser, *supra* note 190, at 389.

¹⁹² *Supra* note 185.

The Fourth Amendment is generally a limitation upon enforcement officers, and the privilege against self-incrimination is a limitation upon prosecutors and trial courts. The former is ostensibly to protect physical privacy; and the latter the privacy of one's knowledge. Privacy is just as much and as unreasonably infringed by the seizure of a document or a chattel as by compelling a person to produce the same or to testify . . . in such manner as to incriminate himself. . . .¹⁹³

An interesting parallel to the freedom from unreasonable searches and seizures of one's person, house, papers, and effects and the right of privacy under the fourth amendment¹⁹⁴ may be drawn with one's freedom of association and his resulting privacy of association under the first amendment.

This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.¹⁹⁵

Under these circumstances, it would be more consonant with the wording of the fourth amendment and the present recognition of one's right of privacy, that he be free from intrusion of the privacy of his person, papers, and effects, as well as his house unless an independent magistrate or absolute necessity requires otherwise in any particular case.

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¹⁹³ Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 Colum. L. Rev. 11, 17 (1925). See *Boyd v. United States*, 116 U.S. 616 (1886).

¹⁹⁴ The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). (Emphasis added.)

¹⁹⁵ *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 544 (1963) quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).